

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DELBERT D. WILLIAMS,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security  
Administration<sup>1</sup>,

Defendant.

NO: 12-CV-0203-TOR

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment (ECF Nos. 25 and 30). Plaintiff is represented by Maureen J. Rosette.

<sup>1</sup> Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of 42 U.S.C. § 405(g).

1 Defendant is represented by Willy M. Le. The Court has reviewed the  
2 administrative record and the parties' completed briefing and is fully informed.  
3 There being no reason to delay a decision, the hearing set for May 13, 2014 is  
4 vacated. For the reasons discussed below, the Court grants Defendant's motion  
5 and denies Plaintiff's motion.

#### 6 JURISDICTION

7 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g).

#### 8 STANDARD OF REVIEW

9 A district court's review of a final decision of the Commissioner of Social  
10 Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is  
11 limited: the Commissioner's decision will be disturbed "only if it is not supported  
12 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,  
13 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means  
14 relevant evidence that "a reasonable mind might accept as adequate to support a  
15 conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently,  
16 substantial evidence equates to "more than a mere scintilla[,] but less than a  
17 preponderance." *Id.* (quotation and citation omitted). In determining whether this  
18 standard has been satisfied, a reviewing court must consider the entire record as a  
19 whole rather than searching for supporting evidence in isolation. *Id.*

1 In reviewing a denial of benefits, a district court may not substitute its  
2 judgment for that of the Commissioner. If the evidence in the record “is  
3 susceptible to more than one rational interpretation, [the court] must uphold the  
4 ALJ’s findings if they are supported by inferences reasonably drawn from the  
5 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district  
6 court “may not reverse an ALJ’s decision on account of an error that is harmless.”  
7 *Id.* at 1111. An error is harmless “where it is inconsequential to the [ALJ’s]  
8 ultimate nondisability determination.” *Id.* at 1115 (quotation and citation omitted).  
9 The party appealing the ALJ’s decision generally bears the burden of establishing  
10 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

#### 11 FIVE-STEP SEQUENTIAL EVALUATION PROCESS

12 A claimant must satisfy two conditions to be considered “disabled” within  
13 the meaning of the Social Security Act. First, the claimant must be “unable to  
14 engage in any substantial gainful activity by reason of any medically determinable  
15 physical or mental impairment which can be expected to result in death or which  
16 has lasted or can be expected to last for a continuous period of not less than twelve  
17 months.” 42 U.S.C. § 423(d)(1)(A). Second, the claimant’s impairment must be  
18 “of such severity that he is not only unable to do his previous work[,] but cannot,  
19 considering his age, education, and work experience, engage in any other kind of  
20

1 substantial gainful work which exists in the national economy.” 42 U.S.C. §  
2 423(d)(2)(A).

3 The Commissioner has established a five-step sequential analysis to  
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §  
5 404.1520(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s  
6 work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in  
7 “substantial gainful activity,” the Commissioner must find that the claimant is not  
8 disabled. 20 C.F.R. § 404.1520(b).

9 If the claimant is not engaged in substantial gainful activities, the analysis  
10 proceeds to step two. At this step, the Commissioner considers the severity of the  
11 claimant’s impairment. 20 C.F.R. §404.1520(a)(4)(ii). If the claimant suffers from  
12 “any impairment or combination of impairments which significantly limits [his or  
13 her] physical or mental ability to do basic work activities,” the analysis proceeds to  
14 step three. 20 C.F.R. §404.1520(c). If the claimant’s impairment does not satisfy  
15 this severity threshold, however, the Commissioner must find that the claimant is  
16 not disabled. *Id.*

17 At step three, the Commissioner compares the claimant’s impairment to  
18 several impairments recognized by the Commissioner to be so severe as to  
19 preclude a person from engaging in substantial gainful activity. 20 C.F.R.  
20 §404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the

1 enumerated impairments, the Commissioner must find the claimant disabled and  
2 award benefits. 20 C.F.R. § 404.1520(d).

3 If the severity of the claimant's impairment does meet or exceed the severity  
4 of the enumerated impairments, the Commissioner must pause to assess the  
5 claimant's "residual functional capacity." Residual functional capacity ("RFC"),  
6 defined generally as the claimant's ability to perform physical and mental work  
7 activities on a sustained basis despite his or her limitations (20 C.F.R. §  
8 404.1545(a)(1)), is relevant to both the fourth and fifth steps of the analysis.

9 At step four, the Commissioner considers whether, in view of the claimant's  
10 RFC, the claimant is capable of performing work that he or she has performed in  
11 the past ("past relevant work"). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is  
12 capable of performing past relevant work, the Commissioner must find that the  
13 claimant is not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of  
14 performing such work, the analysis proceeds to step five.

15 At step five, the Commissioner considers whether, in view of the claimant's  
16 RFC, the claimant is capable of performing other work in the national economy.  
17 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the Commissioner  
18 must also consider vocational factors such as the claimant's age, education and  
19 work experience. *Id.* If the claimant is capable of adjusting to other work, the  
20 Commissioner must find that the claimant is not disabled. 20 C.F.R. §

1 404.1520(g)(1). If the claimant is not capable of adjusting to other work, the  
2 analysis concludes with a finding that the claimant is disabled and is therefore  
3 entitled to benefits. *Id.*

4 The claimant bears the burden of proof at steps one through four above.  
5 *Lockwood v. Comm’r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If  
6 the analysis proceeds to step five, the burden shifts to the Commissioner to  
7 establish that (1) the claimant is capable of performing other work; and (2) such  
8 work “exists in significant numbers in the national economy.” 20 C.F.R. §  
9 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

#### 10 ALJ’S FINDINGS

11 Plaintiff applied for Title II disability insurance benefits in October 2008,  
12 with an alleged onset date of August 3, 2007. Tr. 162-174. Plaintiff’s applications  
13 were denied initially and upon reconsideration. Tr. 87-90, 97-98. Plaintiff timely  
14 requested a hearing (Tr. 101-102) and appeared with an attorney at a hearing  
15 before an administrative law judge (“ALJ”) on December 28, 2010. Tr. 41-83.

16 The ALJ issued a decision on January 28, 2011, finding that Plaintiff was  
17 not disabled under the Act. Tr. 17-28. First, the ALJ found Plaintiff met the  
18 insured status requirements for Disability Insurance Benefits through December  
19 31, 2012. Tr. 19. Next, at step one, the ALJ found that Plaintiff had not engaged  
20 in substantial gainful activity since August 3, 2007, the date of Plaintiff’s tragic

1 accident. *Id.* At step two, the ALJ found that Plaintiff had severe impairments, but  
2 at step three the ALJ found that Plaintiff did not have an impairment or  
3 combination of impairments that met or equaled a Listing of impairment. Tr. 19-  
4 20. The ALJ determined Plaintiff had the RFC to:

5 perform sedentary work, as defined in 20 CFR 404.1567(b)<sup>2</sup> but with  
6 some modification, including lifting and carrying 20 pounds  
7 occasionally and 10 pounds frequently, standing or walking 2 of 8  
8 hours, sitting 6 of 8 hours, and unlimited pushing and pulling within  
9 lifting restrictions. The residual functional capacity is compromised  
10 by occasional balancing, stooping, crouching, kneeling, crawling, use  
11 of foot controls, and climbing of ramps and stairs, as well as no  
12 climbing of ladders, ropes, or scaffolds. The residual functional  
capacity is further compromised by environmental limitations on  
avoiding exposure to concentrated extreme cold, excessive vibration,  
unprotected heights, and using moving machinery, as well as the  
mental limitations of simple, routine, and repetitive tasks; occasional  
decision making and changes in work setting; no fast paced  
production requirements; and no complex verbal or written  
communication.

13 Tr. 21-26. At step four, the ALJ found that Plaintiff was unable to perform  
14 past relevant work. Tr. 26. At step five the ALJ found Plaintiff could  
15 perform jobs that exist in significant numbers in the national economy in a  
16 representative occupation such as an unskilled sedentary job of cashier II.

17 Tr. 26-27. Since the ALJ found that, considering Plaintiff's age, education,  
18 work experience, and RFC, the Plaintiff was capable of making a successful  
19

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20 <sup>2</sup> This appears to be a typo because sedentary is defined at subsection (a).

1 adjustment to other work that exists in significant numbers in the national  
2 economy, a finding of not disabled was made. Tr. 27.

3 On February 23, 2012, the Appeals Council denied Plaintiff's request for  
4 review (Tr. 1-6), making the ALJ's decision the Commissioner's final decision that  
5 is subject to judicial review. 42 U.S.C. § 405(g); 20 C.F.R. §§ 404.981.

## 6 ISSUES

7 Plaintiff, Delbert D. Williams, seeks judicial review of the Commissioner's  
8 final decision denying his Title II disability insurance benefits. Plaintiff has raised  
9 three issues for review: (1) whether the ALJ provided specific and legitimate  
10 reasons to reject Dr. William Shank's opinion (ECF No. 26 at 22); (2) whether  
11 substantial evidence supports the ALJ's decision that Plaintiff did not meet a  
12 Listed impairment (*Id.* at 22-24); and (3) whether the ALJ provided clear and  
13 convincing reasons for discounting Plaintiff's testimony (*Id.* at 24-25). The  
14 Commissioner contends the final decision in this matter should be affirmed  
15 because it is supported by substantial evidence and contains no harmful legal error.  
16 ECF No. 30 at 20.

## 17 DISCUSSION

### 18 A. Examining Physician's Opinion

19 There are three types of physicians: "(1) those who treat the claimant  
20 (treating physicians); (2) those who examine but do not treat the claimant



1 (examining physicians); and (3) those who neither examine nor treat the claimant  
2 [but who review the claimant's file] (nonexamining [or reviewing] physicians).”  
3 *Holohan v. Massanari*, 246 F.3d 1195, 1201 -1202 (9th Cir. 2001) (citations  
4 omitted). Generally, a treating physician's opinion carries more weight than an  
5 examining physician's, and an examining physician's opinion carries more weight  
6 than a reviewing physician's. *Id.* In addition, the regulations give more weight to  
7 opinions that are explained than to those that are not, and to the opinions of  
8 specialists concerning matters relating to their specialty over that of nonspecialists.  
9 *Id.* (citations omitted). A physician's opinion may be entitled to little if any weight,  
10 when it is an opinion on a matter not related to her or his area of specialization. *Id.*  
11 at 1203, n. 2 (citation omitted).

12 A treating physician's opinions are entitled to substantial weight in social  
13 security proceedings. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228  
14 (9th Cir. 2009). If a treating or examining physician's opinion is uncontradicted,  
15 an ALJ may reject it only by offering “clear and convincing reasons that are  
16 supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th  
17 Cir. 2005). “However, the ALJ need not accept the opinion of any physician,  
18 including a treating physician, if that opinion is brief, conclusory and inadequately  
19 supported by clinical findings.” *Bray*, 554 F.3d at 1228 (quotation and citation  
20 omitted). “If a treating or examining doctor's opinion is contradicted by another

1 doctor's opinion, an ALJ may only reject it by providing specific and legitimate  
2 reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d  
3 at 1216 (citing *Lester v. Chater*, 81 F.3d 821, 830-831 (9th Cir. 1995)).

4 Plaintiff argues that the ALJ failed to provide specific and legitimate reasons  
5 for discounting Dr. Shanks’ opinion that Plaintiff “would need to avoid repetitive  
6 bending, twisting, and heavy lifting because of the lumbar spine condition”,  
7 “would have permanent restrictions associated with the residuals of his injury”,  
8 and “was not capable of employment at the time.” ECF No. 26 at 21-22. Dr.  
9 Shanks examined Plaintiff in May 2009, nearly two years after Plaintiff’s accident,  
10 but did not treat him. Tr. 25; 1129-36. Dr. Shanks expressed that he had no  
11 definite treatment to recommend at this time. Tr. 25; 1134. While Dr. Shanks  
12 reported instability of the left knee, limited range of motion in the left foot, good  
13 smooth hip motion, and no complaints of lumbar pain. Tr. 1133-34. Dr. Shanks  
14 opined that Plaintiff was currently unable to work because of his “significant  
15 injuries” and observed that Plaintiff lacked training in light or sedentary work. Tr.  
16 25; 1135. Dr. Shanks noted that Plaintiff avoided repetitive bending, twisting, and  
17 heavy lifting. Tr. 1135. Dr. Shanks indicated that, with training, Plaintiff could  
18 work as a picture-framer so long as he was not required to perform “heavy lifting.”  
19 Tr. 1135.

20 The ALJ discounted Dr. Shanks’ opinion, reasoning as follows:

1 This opinion is given little weight in the determination of disability  
2 because, based on the same injuries, he finds a significantly greater  
3 degree of impairment than other equally qualified sources. Further, his  
4 statement that the claimant is not capable of working at this time is  
5 not entitled to weight, as capacity at the light to sedentary level is  
6 indicated, but the physician cites the lack of training for employment  
7 at these lesser levels of exertion. This is neither a basis for disability  
8 nor for being unable to work.

9 Tr. 25. Plaintiff asserts the ALJ never identified these other “equally qualified  
10 sources.” ECF No. 26 at 22. Plaintiff plainly overlooks the ALJ’s extensive  
11 discussion of his treating physician’s opinion, Dr. Howlett, another examining  
12 physician’s opinion, Dr. Friedman’s, and a consulting physician’s opinion, Dr.  
13 Arnold. Tr. 24-25. Dr. Howlett, of Northwest Orthopaedic Specialists,  
14 treated Plaintiff from September 28, 2007 through May 14, 2008, at which point  
15 Plaintiff was “reaching the point of maximal medical improvement.” Tr. 24; 1154.  
16 In March 2008, Dr. Howlett recommended sedentary activity...right away. Tr.  
17 1056. By May 2008, Dr. Howlett observed, “He is very motivated to go back to  
18 work including welding, and I think he can with these boots and conservative  
19 management and a custom made orthosis.” Tr. 1053.

20 The ALJ observed that Dr. Friedman reported Plaintiff was released to light  
duty on September 17, 2008, by Dr. Howlett. Tr. 24; 1083. Dr. Friedman notes  
that the only medications for pain the claimant was taking were Ibuprofen and  
Tylenol and stated that Plaintiff could return to work with the permanent restriction  
of light duty due orthopedic injuries unrelated to pain. Tr. 24-25; 1087-88.

1 The ALJ further discussed the opinions of Dr. Arnold, a medical consultant  
2 (Tr. 25) and Dr. Staley, a medical consultant (Tr. 26), in formulating Plaintiff's  
3 residual functional capacity assessment.

4 Plaintiff does not demonstrate with any particularity how Dr. Shanks'  
5 opinion has not already been incorporated into the ALJ's RFC finding. Certainly  
6 Dr. Shanks' conclusion was rejected, and for legitimate reason. For these reasons,  
7 the Court finds the ALJ offered specific and legitimate reasons, supported by  
8 substantial evidence, for rejecting Dr. Shanks' vocational conclusion.

9 **B. Whether Plaintiff Meets or Equals a Listed Impairment**

10 Plaintiff contends that if the ALJ had given proper weight to Dr. Shanks'  
11 opinion, he "very likely would have met or equaled" the Listing at 1.02A. ECF  
12 No. 26 at 22-24. In support of his argument, Plaintiff recounted Dr. Shanks'  
13 examination findings that Plaintiff suffered some range of motion limitations in his  
14 left leg, ankle and foot. Id. at 23; Tr. 1133.

15 Listing 1.02A is defined as a major dysfunction of a joint(s) due to any  
16 cause:

17 Characterized by gross anatomical deformity (e.g., subluxation,  
18 contracture, bony or fibrous ankylosis, instability) and chronic joint  
19 pain and stiffness with signs of limitation of motion or other abnormal  
20 motion of the affected joint(s), and findings on appropriate medically  
acceptable imaging of joint space narrowing, bony destruction, or  
ankylosis of the affected joint(s). With:

1 A. Involvement of one major peripheral weight-bearing joint  
 2 (i.e., hip, knee, or ankle), resulting in inability to ambulate  
 effectively, as defined in 1.00B2b[.]

3 20 C.F.R. pt. 404, subpt. P, app. 1, § 1.04A. The inability to ambulate effectively  
 4 means “an extreme limitation of the ability to walk; i.e., an impairment(s) that  
 5 interferes very seriously with the individual's ability to independently initiate,  
 6 sustain, or complete activities.” 20 C.F.R. pt. 404, subpt. P, app. 1, §  
 7 1.00(B)(2)(b)(1). An example of ineffective ambulation is “the inability to walk  
 8 without the use of a walker, two crutches or two canes[.]” *Id.* at 1.00(B)(2)(b)(2).

9 Thus, Dr. Shanks’ opinion does not show that Plaintiff has an impairment or  
 10 combination of impairments that meets or equals Listing 1.02A. Plaintiff reported  
 11 trying to take a daily walk in good weather, going out alone and driving a vehicle  
 12 independently, and occasionally doing simple grocery shopping. Tr. 22. His wife  
 13 confirmed that he can walk a block and that he uses a cane. *Id.* Accordingly,  
 14 substantial evidence in the record supports the ALJ’s finding that Plaintiff’s  
 15 impairments did not meet or equal a Listed impairment.

### 16 **C. Adverse Credibility Findings**

17 In social security proceedings, a claimant must prove the existence of  
 18 physical or mental impairment with “medical evidence consisting of signs,  
 19 symptoms, and laboratory findings.” 20 C.F.R. § 404.1508. A claimant’s  
 20 statements about his or her symptoms alone will not suffice. 20 C.F.R. §§

1 404.1508; 404.1527. Once an impairment has been proven to exist, the claimant  
2 need not offer further medical evidence to substantiate the alleged severity of his or  
3 her symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc).  
4 As long as the impairment “could reasonably be expected to produce [the]  
5 symptoms,” 20 C.F.R. § 404.1529(b), the claimant may offer a subjective  
6 evaluation as to the severity of the impairment. *Id.* This rule recognizes that the  
7 severity of a claimant’s symptoms “cannot be objectively verified or measured.”  
8 *Id.* at 347 (quotation and citation omitted).

9 In the event that an ALJ finds the claimant’s subjective assessment  
10 unreliable, however, “the ALJ must make a credibility determination with findings  
11 sufficiently specific to permit [a reviewing] court to conclude that the ALJ did not  
12 arbitrarily discredit claimant's testimony.” *Thomas v. Barnhart*, 278 F.3d 947, 958  
13 (9th Cir. 2002). In making such a determination, the ALJ may consider, *inter alia*:  
14 (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the claimant’s  
15 testimony or between his testimony and his conduct; (3) the claimant’s daily living  
16 activities; (4) the claimant’s work record; and (5) testimony from physicians or  
17 third parties concerning the nature, severity, and effect of the claimant's condition.  
18 *Id.* The ALJ “must specifically identify the testimony she or he finds not to be  
19 credible and must explain what evidence undermines the testimony.” *Holohan v.*  
20 *Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001).

1 Plaintiff argues that the ALJ did not provide clear and convincing reasons  
2 for discounting his credibility, regarding his testimony about his “limited ability to  
3 sit/stand/walk/lift.” ECF No. 26 at 25.

4 Here, the ALJ thoroughly reviewed and recounted the evidence: Plaintiff’s  
5 wife reported that Plaintiff “performs only a small portion of the care needed by  
6 their pets; experiences disturbed sleep due to pain; engages in simple food  
7 preparation; attends to a small amount of light housework; but does not perform  
8 yard work due to difficulty being on his feet and with lifting. The wife indicated  
9 that she handles finances, but the claimant goes outside once a day, is able to go  
10 out alone, drives and rides in a vehicle, and shops once a week for minor grocery  
11 items. She reported that he enjoys hobbies in the form of watching television daily,  
12 playing a guitar weekly, and playing Frisbee golf; socializes with family members  
13 weekly, often playing board games; is independent when going out; and has no  
14 difficulties relating to others.” Tr. 21-22. His wife further explained that Plaintiff  
15 “is left dominant; is able to walk a block, and then must rest 30 minutes; . . . but  
16 has difficulty with lifting, walking, standing, squatting, standing, bending, seeing,  
17 and climbing stairs due to physical injuries.” Tr. 22.

18 On the other hand, the ALJ found that Plaintiff himself reported:

19 living with his family, having no difficulty with personal care,  
20 providing part of the care for a dog, doing simple food preparation 3  
times a day, and doing some cleaning and some laundry [Tr. 209-17].  
He reported not trying to do any yard work since being injured, trying

1 to take a daily walk in good weather, going out alone and driving a  
2 vehicle independently, and occasionally doing simple grocery  
3 shopping. In contrast to his wife, he indicated that he is able to pay  
4 bills and calculate change, and that his ability in this area has not  
5 changed since his injury. The claimant reported the daily hobbies of  
6 watching television and playing guitar, playing guitar once a week  
7 socially with others, and not needing anyone to accompany him when  
8 he goes out alone, but not going out as much as he did before. He  
9 listed difficulty with most movement, being able to lift 10 pounds,  
10 being able to walk 2 blocks and then rest 10 minutes, and being able  
11 to pay attention for 8 hours. . . He explained that the use of a cane and  
12 special shoes have been prescribed.

13 Tr. 22. The ALJ recorded that at the hearing, Plaintiff testified that “he is trying to  
14 be more active, but experiences pain; that he would like to work, but as for  
15 working 8 hours a day and 5 days a week, knows he is not able to. . . The claimant  
16 also explained that Dr. Howlett said sedentary not light activity, and released him  
17 to help move along the industrial claim to get settlement going.” *Id.*

18 The ALJ recounted the extensive medical evidence, including an October  
19 2008 report from Craig W. Beaver, Ph.D., noting that Plaintiff “had recently been  
20 released to return to light duty work. The claimant reported taking no medications;  
trying to walk daily, but not doing any formal exercise; and typically watching  
television and doing yard work. He described left ankle and foot pain which is not  
overwhelming but never comfortable; mild intermittent back pain related to  
activities. . .” Tr. 23. The ALJ then recounted the opinions of Drs. Howlett,  
Friedman, Arnold and Staley, as indicated above. Tr. 24-25.



1 Other than Plaintiff's conclusory testimony that he cannot work, the ALJ  
2 incorporated Plaintiff's limitations, tempered by what he reported to his treating  
3 and examining doctors, in formulating the restricted, **sedentary** residual functional  
4 capacity assessment. Plaintiff has not demonstrated any error.

5 Having thoroughly reviewed the record, the Court finds that the ALJ's  
6 discounted credibility findings regarding the extent of Plaintiff's limitations is  
7 specific, clear and convincing and supported by substantial evidence.

8 **ACCORDINGLY, IT IS HEREBY ORDERED:**

9 1. Plaintiff's Motion for Summary Judgment, ECF No. 25, is **DENIED**.

10 2. Defendant's Motion for Summary Judgment, ECF No. 30, is

11 **GRANTED.**

12 3. The hearing on the parties' cross-motions for summary judgment  
13 currently scheduled for May 13, 2014, is **VACATED**.

14 The District Court Executive is hereby directed to file this Order, enter  
15 Judgment for Defendant, provide copies to counsel, and **CLOSE** this file.

16 **DATED** September 30, 2013.



*Thomas O. Rice*  
THOMAS O. RICE  
United States District Judge